

## HEIRS OF GEORGE TITUS

IBLA 90-380

Decided August 13, 1992

Appeal from a decision of the Alaska State Office, Bureau of Land Management, reaffirming rejection of Native allotment application F-027045, Parcels A, B, and C.

Reversed and remanded.

1. Alaska: Native Allotments--Alaska National Interest Lands Conservation Act: Duty of Department of the Interior to Native Allotment Applicants

Where a Native allotment applicant has filed a Native allotment application prior to Dec. 18, 1971, and BLM rejected the application in 1968 without affording him an opportunity for a hearing, the rejection decision is not final and the application may be reinstated. Where the application is reinstated, it is properly deemed to be "pending" before the Department on Dec. 18, 1971, within the meaning of sec. 905(a) of ANILCA.

2. Alaska: Native Allotments--Alaska: Statehood Act--Alaska National Interest Lands Conservation Act: State Selections--Alaska National Interest Lands Conservation Act: Valid Existing Rights

A Native allotment application pending before the Department on Dec. 18, 1971, was not legislatively approved under sec. 905(a)(1) of ANILCA where it describes land which was validly selected by the State of Alaska pursuant to the Alaska Statehood Act on or before Dec. 18, 1971. Instead, the application must be adjudicated pursuant to the requirements of the Native Allotment Act.

APPEARANCES: Judith K. Bush, Esq., Alaska Legal Services Corporation, Fairbanks, Alaska, for appellant.

### OPINION BY ADMINISTRATIVE JUDGE HUGHES

The heirs of George Titus (appellants) have appealed from the April 27, 1990, decision of the Alaska State Office, Bureau of Land Management (BLM), reaffirming rejection of his Native allotment application (F-027045).

BLM's decision states that, on November 22, 1960, the Bureau of Indian Affairs (BIA) completed the "required certification" and filed Native allotment application F-027045 on behalf of Titus under the provisions of the Act of May 17, 1906, as amended (Native Allotment Act), 43 U.S.C. §§ 270-1 to 270-3 (1970). 1/ The 1960 application sought approximately 160 acres of unsurveyed land located in secs. 10, 15, and 16, T. 1 S., R. 8 W., Fairbanks Meridian, Alaska.

However, as filed, the application failed to identify the date use and occupancy commenced. Accordingly, on November 7, 1961, BLM issued a decision holding the application for rejection, allowing Titus 30 days from receipt of the decision to submit satisfactory evidence that he had used and occupied the subject lands prior to October 28, 1960. That date was significant, as the State of Alaska had at that time filed competing State selection applications (F-026791 and F-026792) under the provisions of section 6(b) of the Act of July 7, 1958 (Alaska Statehood Act), 72 Stat. 399, as amended. BLM's decision cautioned that the application would be rejected and the case file closed without further notice if Titus failed to provide the required information. On September 10, 1962, having received no information in response to its decision, BLM closed its case file. The closing of the 1960 application is not at issue here.

Despite BLM's action, on August 3, 1965, Titus filed a form letter stating that he wanted to amend his present application to include several tracts. The letter was accompanied by land descriptions for three parcels. On April 14, 1966, BIA, acting on behalf of Titus, filed an application for Parcels A, B, and C. All three parcels were entirely covered by conflicting State selection applications. 2/ Use and occupancy was claimed since 1930 for Parcel A, since 1916 for Parcel B, and since 1920 for Parcel C. However, that application was unclear as to the length of the claimed use and occupancy.

On June 17, 1966, BLM notified Titus that the time fixed by law within which to submit proof of use and occupancy for Parcel A would expire on November 22, 1966. BLM also requested that Titus file proof of 5 years' use and occupancy on Parcels B and C at the same time, if possible. On November 28, 1966, BIA filed evidence of use and occupancy forms on behalf

1/ The Native Allotment Act was repealed with a savings provision by the Alaska Native Claims Settlement Act of Dec. 18, 1971, 43 U.S.C. § 1617 (1988).

2/ The parcels are described as follows: Parcel A: sec. 17, T. 1 S., R. 8 W., Fairbanks Meridian, containing approximately 10 acres; Parcel B: secs. 11 and 14, T. 3 S., R. 8 W., Fairbanks Meridian, containing approximately 70 acres; and Parcel C: sec. 15, T. 1 N., R. 7 W., Fairbanks Meridian, containing approximately 20 acres. Parcel A was covered by State selection application F-026792, filed on Sept. 30, 1960; Parcel B by State selection application F-026795, filed on Sept. 30, 1960; and Parcel C by State selection application F-026809, filed on Oct. 3, 1960.

of Titus for all three parcels. However, the forms filed referred to only 1 year of use and occupancy for each parcel. <sup>3/</sup>

On January 9, 1967, BLM transmitted a memorandum to BIA enclosing copies of the forms and explaining that they did not show 5 years of continuous use and occupancy as required by law. BLM stated that it intended to issue another decision rejecting evidence of use and occupancy and closing the case file 30 days from that date. BIA never responded to BLM's memorandum.

BLM did not immediately issue a decision rejecting the application, but returned the use and occupancy forms to Titus on May 17, 1967, requesting that he complete the forms by inserting the approximate dates he spent on each parcel of land during a 5-year period. The use and occupancy forms were never returned to BLM. A note in the case file indicates that Titus died on March 22, 1968.

On May 31, 1968, BLM issued a decision rejecting the application because Titus had not shown substantial use and occupancy for 5 years as required by 43 CFR 2212.9-4(a) (1968).

However, in March 1979, BLM reviewed Titus' application for these parcels and reinstated it without explanation. BLM conducted favorable field examinations of these parcels in 1985. BLM's field examiner conducted interviews with Titus' wife, Minnie, his brother, Charlie Titus, and others knowledgeable about his use of these parcels for a summer fish camp, for hunting and trapping, berrypicking, and other subsistence activities. The field examiner concluded that Titus had met the use and occupancy requirements of the Native Allotment Act and concluded that his use predated the conflicting State selection on all three parcels. Field reports were approved on September 17 and 18, 1985, for Parcel A, October 9, 1985, for Parcel B, and September 17 and 18, 1985, for Parcel C.

Despite these favorable reports and without comment thereon, BLM's April 1990 decision reaffirmed its May 1968 rejection of his application. Citing Mary Olympic (On Reconsideration), 65 IBLA 26 (1982), BLM held that Titus' application had not been legislatively approved under section 905(a) of the Alaska National Interest Lands Conservation Act (ANILCA), 43 U.S.C. § 1634 (1988), because the application was not pending on December 18, 1971. Additionally, BLM noted that all three parcels covered by Titus' application were validly selected by the State of Alaska, pursuant to the Alaska Statehood Act, so that the application had to be adjudicated under the Native Allotment Act. Noting that the Native Allotment Act and applicable regulations require an applicant to make satisfactory proof of substantially

<sup>3/</sup> Thus, for Parcel A, the form states "fishing 1930, July through August, moved up every now and then, moved back to village to work;" for Parcel B: "Trapping and fishing, 1916, July through August, stayed one summer for fishing, fishing slacked off;" for Parcel C: "Trapping and fishing, 1920, March to June 1, moved back to village."

continuous use and occupancy of the land for a period of 5 years, and that Titus had shown same for only 1 year for each parcel, BLM held that his Native allotment application had been properly rejected on May 31, 1968.

Appellants assert that, despite the on-the-ground evidence provided by the field reports and the first-hand interviews conducted by its field examiner, BLM relied exclusively on its earlier May 31, 1968, rejection decision and the "legally defective" paperwork filed by Titus. Appellants argue that, since the application was rejected without benefit of a hearing as required by Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976), it was pending before the Department on December 18, 1971. As a result, they argue, under section 905(a) of ANILCA, 43 U.S.C. § 1634(a) (1988), the application was either legislatively approved or must be adjudicated pursuant to the requirements of the Alaska Native Allotment Act. They also submit that, under Pence v. Kleppe, supra at 143, where adjudication is appropriate, factual questions regarding a Native's use and occupancy must be resolved by an independent decisionmaker before BLM may close the Native's allotment case.

[1] BLM's determination that Titus' reinstated application was not pending on December 18, 1971, having been rejected on May 31, 1968, is not sustainable. Appellants are correct that, under Pence v. Kleppe, supra at 142-43, BLM's May 1968 decision rejecting Titus' application does not finally adjudicate the matter, as he was not provided with an opportunity for a hearing. The Department has long recognized this general exception to the doctrine of administrative finality, and that an application, even though previously rejected by BLM, is properly considered "pending" where the rejection was not accompanied by a right to a hearing. Heirs of Sockpealuk, 115 IBLA 317, 325 (1990); State of Alaska (Hazel L. Barlip), 109 IBLA 339, 343 (1989); see also Olympic v. United States, 615 F. Supp. 990, 992-93 (D. Alaska 1985). 4/

4/ The court decision reversed Mary Olympic (On Reconsideration), supra, relied on by BLM in its decision. In that case, Alexis Gregory had filed a Native allotment application in 1960, which BLM rejected in 1967 because of his failure to correct problems in the land description. No appeal was taken from the 1967 rejection. Gregory died in September 1967. In 1975, his heir Mary Olympic requested that BLM reinstate the application so that she could correct the land description. BLM denied the request, and this Board affirmed BLM's decision, ruling that BLM's rejection of Gregory's application became final when he failed to appeal in 1967. Mary Olympic (On Reconsideration), supra at 35. In view of that final rejection, we held, Gregory's application could not properly be regarded as "pending" on Dec. 18, 1971. However, the District Court for the District of Alaska reversed our Olympic decisions, holding that BLM's 1967 rejection did not prevent Gregory's application from being considered as "pending" on Dec. 18, 1971, within the meaning of section 905(a) of ANILCA. Olympic v. United States, supra at 992-93. Further, the Court held that Olympic, as Gregory's heir, was authorized to amend his application. Id. at 993-95.

[2] As Titus' application was pending on December 18, 1971, it remains to determine whether it was legislatively approved under section 905(a)(1) of ANILCA. We conclude that it was not.

Under section 905(a)(4) of ANILCA, 43 U.S.C. § 1634(a)(4) (1988), where an allotment application describes land which was validly selected by the State of Alaska pursuant to the Alaska Statehood Act on or before December 18, 1971, the application shall be adjudicated pursuant to the requirements of the Native Allotment Act. Here, State selection applications were filed in 1960 covering each of the 3 parcels Titus applied for. Accordingly, the allotment was not legislatively approved, but must be adjudicated in accordance with established procedures. See Christine Hansen Monroe, 112 IBLA 181, 183 (1989); State of Alaska (Hazel L. Barlip), *supra* at 344; State of Alaska, 85 IBLA 196 (1985).

An application for a Native allotment must be rejected if the use and occupancy commenced after the time that a State selection application was filed for the land. Christine Hansen Monroe, *supra* at 183; William M. Tennyson Jr., 66 IBLA 38, 40 (1982). However, there appears to be little doubt from BLM's own field reports in the record that Titus' use and occupancy commenced long before the filing of the State selection application in 1960. 5/

5/ The record discloses that BLM completed a field report for Parcel A on Aug. 29, 1985, after a field examination on Aug. 23, 1985. The report indicates that the BLM employee performing the field examination was accompanied to the site by Titus' wife, Minnie, who advised that the parcel was Titus' fish camp near old Minto, and that his use started about 1930. The report details posting found on the land and contains the following statement: "I conclude from the evidence found on the ground, cleared out area, notched tent frame poles, cans and trails that George [Titus] had complied with the [Native Allotment Act] of 1906. I recommend this parcel be approved as described" (Report for Parcel A at 5, dated Aug. 29, 1985). BLM's "Native Allotment Field Report Title Page" for Parcel A states: "Use and occupancy predates all selections" (Report Title Page at 1).

BLM completed a field report for Parcel B on Oct. 3, 1985, after performing field examinations on June 12 and Sept. 23, 1985. The report states that "[u]se was initiated in 1930-40 era," as verified by applicant's wife and Town Recorder Richard Frank. Evidence of use and occupancy included a campsite, fire pits, trails, and firewood cuttings (Report at 3), and witnesses advised that Titus used the area for trapping, hunting, and some fishing. BLM's "Native Allotment Field Report Title Page" for Parcel B states: "Use and occupancy predates all selections" (Report Title Page at 1).

BLM completed a report for Parcel C on Aug. 29, 1985, after performing a field examination on Aug. 21, 1985. The BLM field examiner noted that Titus' brother, who accompanied him to the site, possessed excellent knowledge of Titus' use. The examiner observed that the land was posted and was advised that Titus started using the area in 1920 for hunting, fishing, seasonal berrypicking, and other food gathering (greens and roots) (Report at 1).

In fact, BLM's field reports appear to provide a strong basis for the conclusion that Titus achieved qualifying use and occupancy, so that there does not appear to be any issue of fact requiring a hearing. See William M. Tennyson, Jr., 66 IBLA 38 (1982). Accordingly, on remand, BLM should proceed to adjudicate the validity of Titus' application and the conflicting State selection applications. Any decision granting the allotment should provide the State with the customary opportunity either to initiate a private contest or file a notice of appeal. See State of Alaska, 42 IBLA 94 (1979).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed, and the matter is remanded to BLM for further action consistent with this decision.

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David L. Hughes  
Administrative Judge

I concur:

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Bruce R. Harris  
Deputy Chief Administrative Judge